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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 463

HANS ELLIOT And UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

versus

THOMAS R. LOMBARD.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

ORIGINAL BRIEF FOR THOMAS R. LOMBARD.

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Statement of Case.

This is an action *in rem* and *personam* by Thomas R. Lombard, owner of a sand barge, for its sinking, due to collision with the motor-ship "Real", owned and claimed by Hans Elliot in the navigable waters of the Canal Zone July 31st, 1930, claiming $14,438.00 loss of said barge and machinery. Being a non-resident and the value of the motor-ship "Real" being alleged less than $5,000.00, an

attachment against certain monies was also granted. (Tr. 3-10).

A stipulation for costs in the sum of $250.00 was filed by claimant, Hans Elliot, owner of the motor-ship "Real", with the United States Fidelity & Guaranty Company, as surety, conditioned "that they, and each of them shall pay all costs and expenses which shall be awarded against the said M/V Real, her engines, boat, boilers, tackle, apparel, furniture, etc., and Hans Elliot and for the stipulator undersigned or any of them by decree of this Court, and in case of appeal by any Appellate Court."

Thereupon, Hans Elliot, owner, claimed the M/V Real (Tr. 19).

The United States Fidelity & Guaranty Company signed the Release Bond (Tr. 20-21) in the sum of Ten Thousand Dollars, with the following condition:

> "Now, therefore, the condition of this stipulation is such that if the stipulators undersigned, shall at any time, upon the interlocutory or final order or decree of the said District Court, or of any Appellate Court to which the above named suit may proceed, and upon notice of such order or decree to Vansiclen and Boggs, Esquires, Proctors for the Claimant of the said Motorship Real, abide by and pay the money awarded by the final decree rendered by the Court or the Appellate Court if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue.
>
> H. Elliot
> Hans Elliot
> W. Y. Boyd, Attorney for the United States Fidelity and Guaranty Company."

A cross-libel was filed by Hans Elliot (Tr. 39) and a stipulation for costs with United States Fidelity and Guaranty Company, in the sum of $250.00 as surety, conditioned "to pay all costs and expenses which shall be awarded against the said libellant and/or the stipulator undersigned or any one of them by decree of this court and in case of appeal by any Appellate Court." (Tr. 38-39).

This cause proceeded to trial on the libel and cross libel July 24, 1931. (Tr. p. 62, *et seq.*).

On August 13, 1932 (Tr. 70-85) the Court, after due trial and being fully advised, filed its Findings of Fact, Conclusions of Law and Opinion.

The following decree was filed:

(a) "Ordered, adjudged and decreed, that the libelant herein do have and recover from the respondent herein the sum of $6,321.29, with interest thereon at the rate of 5% per annum from the 31st day of July, 1930, together with the libelant's costs, taxed in the sum of $117.20, with interest thereon until paid; and it is further

(b) Ordered, adjudged and decreed, that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon the respondent or his proctor, execution issue against Hans Elliot, respondent, and the United States Fidelity & Guaranty Co., his stipulators for costs and value, their goods, chattels, and lands to satisfy this decree; and it is further

(c) Ordered, adjudged and decreed that the cross libel herein be dismissed at cross libellant's costs."

Done at Ancon, C. Z., this 27th day of August, 1932.

(signed) James J. Lenihan
District Judge.

We mark the three divisions in conformity with petitioner's analysis (a), (b) and (c) so we may refer to each order in that way.

Copy of decree was acknowledged served Aug. 31, 1932 by Proctors for respondent and cross-libellant (Tr. p. 99).

On September 10, 1932, Hans Elliot, claimant and cross libellant, filed his petition of appeal, but did not pray for a supersedeas (Tr. 99-101).

It appears that the order of appeal, which appears at Tr. p. 101, was signed in Chambers, September 10, 1932. This is shown by reference to "Minutes of September 10, 1932," which appear copied at Tr. p. 108, viz:

"Minutes of September 10, 1932.

"The petition of Hans Elliot, claimant and cross libellant, for appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and his assignment of errors having been filed this 10th day of September, 1932, and said appeal having been allowed *in chambers* this day,

It is now ordered *in open court* that the supersedeas bond be and is hereby fixed in the sum of $10,000 and that the cost bond on appeal be and is hereby fixed in the sum of $250.00." (Tr. p. 108).

September 10, was last day for appeal.

A cash deposit of $250.00 was made in lieu of the cost bond. (Tr. p. 111).

Thereupon the transcript was filed in the United States Circuit Court of Appeals, Fifth Circuit.

Whereupon, appellee on April 19, 1933, filed a motion to dismiss the appeal upon the grounds (Tr. 477-478):

"I.

This Court is without jurisdiction to entertain this appeal because the necessary parties to give the Court jurisdiction are not made parties to the appeal.

II.

It appears from the transcript of record, P. 20-21, that the United States Fidelity & Guaranty Company corporate surety doing business in the Canal Zone, became the stipulators and sureties on the release bond of the appellant in the penalty of $10,000 on the 13th day of August, 1930.

It further appears from the transcript, P. 98, that the decree was filed herein August 27, 1932 in favor of libellant and against respondent for the sum of $6,321.29 with interest thereon at the rate of 6% per annum from the 31st day of July, 1930 together with libellant's costs, taxed in the sum of $117.20 with interest thereon until paid.

It is further ordered, adjudged and decreed that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon respondent or his proctor, execution issue against Hans Elliot, respondent and the United States Fidelity & Guaranty Company, his stipulators, for costs and value, their chattels and lands to satisfy this decree.

III.

The record fails to show that the United States Fidelity & Guaranty Company were made a party to the appeal; it does not appear that the surety company was asked to join in the appeal and the record fails to show that there has been any summons or severance issued herein.

IV.

The record fails to show any return day for the appeal. Wherefore, appellee prays that an appropriate order be entered by this Honorable Court, dismissing said appeal.

(Signed) Carlos Icaza, A. and L. S. Carrington, P. M. Milner, Proctors for Libellant and Appellee."

"Thereafter, on April 22, 1933, Hans Elliot, appellant, filed a motion for leave to amend the petition for appeal (Tr. p. 99) to show that the United States Fidelity & Guaranty Company joins the said Hans Elliot as a party appellant (Tr. 478-479). On the same day, April 22, 1933, in the Circuit Court of Appeals, Fifth Circuit, came the United States Fidelity & Guaranty Company waiving issuance and service of citation and filed a motion to join Hans Elliot, appellant. (Tr. 480-481).

To both of these motions, Thomas R. Lombard filed his exceptions (Tr. 482-483) that the motions came too late. That under Section 1005 of the Revised Statutes, being Sec. 3 of Act of June 1, 1872, Chapter 255, 17 Stat. at Large, no provision was made by which sureties upon a forthcoming bond, not having been made parties or (notice printed record erroneously uses word "are") joined in the appeal, and where no summons or severance was allowed, could be allowed in the Appellate Court.

The United States Circuit Court of Appeal dismissed the appeal (Tr. 484-490).

The majority opinion held:

1. That the judgment of the District Court was final and joint and the United States Fidelity and Guaranty Company, surety on the Release Bond, was a necessary party.

2. That "whether a judgment is joint depends on substance rather than form. The test is whether the same relief is granted against all parties." (Tr. 487).

   (On the question of substance rather than form we cite *Hanrick v. Patrick, 119 U. S. 156; Love v. Export Co., 143 Fed. 1, 11; Clarke v. Boysen, 39 F. [2nd] 800-821*).

It cited the case of *Hartford Accident & Indemnity Company v. Bunn, 285 U. S. 169*, as governing the decision in this case as follows (Tr. p. 486):

> "However, in the recent case of Hartford Accident v. Bunn, 285 U. S. 169, where a joint judgment was rendered by the Supreme Court of Mississippi against appellant—and the surety on the appeal bond, it was held, after an extensive review of the authorities, that the surety was an indispensable party to a writ of error to the Supreme Court, and a motion to join the appeal, made after the time for appeal, came too late and could not be entertained. In that case the decision in The New York, 104 Fed. 561, which is typical of that line of cases, was expressly disapproved."

It may not be out of place to say right here that the honorable dissenting judge likewise agrees that if the

judgment appealed from is "joint", the case of *Hartford Accident Co. v. Bunn, 285 U. S. 169*, "is controlling authority in the case at bar. That case settled that United States Fidelity & Guaranty Company cannot be made a co-appellant now, after the time for appeal has expired, if it should have joined in the appeal originally."

The application for the writ of certiorari is based upon an alleged:

1. Lack of harmony in decisions of Circuit Courts of Appeal, upon the question whether a surety on a Release Bond in Admiralty, whose obligation is governed by statute, and in this case, as follows:

> "Now, therefore, the condition of this stipulation is such that if the stipulators undersigned, shall at any time, upon the interlocutory or final order or decree of the said District Court, or of any Appellate Court to which the above named suit may proceed, and *upon notice of such order* or decree to Vansiclen and Boggs, Esquires, Proctors for the claimant of the said Motorship Real, abide by and pay the money awarded by the final decree rendered by the Court or the Appellate Court if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue."

is a necessary party to the appeal.

It would seem to us that we are not concerned with conflicting decisions on this point in Circuit Courts of Appeal. This is the settled practice of the Fifth Circuit Court of Appeals. The Bylands, *231 Fed. 101*, certiorari denied, *241 U. S. 679*. We are only concerned as to what this Honorable Court has decided.

So, we have the majority opinion holding the judgment is final and joint and the surety on Release Bond a necessary party, and the minority opinion holding the decree is not joint and the United States Fidelity and Guaranty Company is not a necessary party. It seems to us, therefore, the only point to be decided in this case by this Court is whether the judgment is final and joint.

ARGUMENT.

It seems abundantly clear to us that the dissenting opinion is illogical and unsound.

First, there are only two actions, a libel and cross-libel—as the libellant won there were or could be only two parts of the judgment; one in favor of libellant and one against claimant and cross-libellant.

This is exactly similar to our Civil Law practice where there is a reconventional demand. There is a judgment in favor of plaintiff against defendant, and a judgment dismissing the reconventional demand.

Therefore, there *were not three distinct judgments*, nor could there be, as the learned dissenting Judge suggests. (Tr. 489).

Using the description of petitioners, for the so-called three parts of the judgment, (a), (b) and (c), we say (a) and (b) naturally are but one judgment. In other words, unless (a) and (b) read together were but one decree

against both respondent claimant and his surety, *execution* could not issue at any time against the surety on the Release Bond *without another judgment.* A joint judgment or decree is a matter of *substance*, not form. *Hanrick v. Patrick, 119 U. S. 156; Love v. Export Co., 143 Fed. 1, 11; Clarke v. Boysen, 39 F. (2nd) 800-821.* The decree is but one decree resolved in two parts, one in favor of libellant and, secondly, dismissing cross libel.

This leaves the decree in favor of libellant as follows:

(a) "Ordered, adjudged and decreed, that the libellant herein do have and recover from the respondent herein the sum of $6,321.29, with interest thereon at the rate of 6% per annum from the 31st day of July, 1930, together with libellant's costs taxed in the sum of $117.20, with interest thereon until paid; and it is further ordered, adjudged and decreed, that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon the respondent or his proctor, execution issue against Hans Elliot, respondent, and the United States Fidelity and Guaranty Company, his stipulators for costs and value, their goods, chattels and lands to satisfy this decree; and it is further

(b) Ordered, adjudged and decreed that the cross-libel herein be dismissed at cross-libellant's costs."

The decree in this case leaves nothing to be done—*in futuro* to make the judgment *final and executory* against the United States Fidelity & Guaranty Company, but *in praesenti* awards judgment in favor of libellant and states

that unless decree be satisfied or an appeal taken, execution, after notice, shall issue against respondent, Hans Elliot, and the United States Fidelity & Guaranty Company, his stipulators, for costs and value, their goods, chattels and lands to *satisfy this decree.*

Considering a judgment or decree as a matter of substance and intention, as your Honors hold, this decree must be declared a *joint decree.*

The decree in *Ex parte Sawyer, 88 U. S. 618*, quoting Justice Waite, after giving judgment against appellant, is:

> "And it is further ordered, adjudged and decreed, that unless an appeal be taken from this decree within the time prescribed by law, a summary judgment therefor be entered in favor of the said libellant, appellees, and against James Lee, Jr., and J. Wade Davis, sureties on said appeal, in the sum of $10,000, the amount of their stipulation by them given on said appeal, and that said appellees have execution therefor to satisfy said decree."

Is it not clear that the decree in that case appealed from is neither final nor joint against the sureties?

It requires *ipsissimis verbis* (first) if no appeal is taken a judgment *in futuro* to be taken against the sureties, and (second) that on the *judgment so to be taken in the future execution issue.*

By no species of mental gymnastics can the decree in this Hans Elliot case be likened to the decree in *Ex parte Sawyer.*

Our citation of *Ex parte Sawyer* was merely to show the absolute dissimilarity.

We think the learned dissenting Judge has fallen into another error. He says (Tr. 489) for the purpose of making the decree which we obtained executory, as follows:

> "For it to be made operative there must be proof of service of a notice on the respondent or his proctor of the rendition of the first judgment, and *proof* of the lapse of ten days thereafter without payment or appeal, consideration of which would perhaps require further judicial action." (Italics ours).

This, in our opinion as a practicing lawyer, is entirely incorrect. The judgment or decree granted in favor of Thomas R. Lombard against Hans Elliot and under consideration now of this Court, does not require anything, after the elapse of ten days, but a *fieri facias*, which issues as a matter of right and at the request of libellant's proctor. The libellant's proctor does not have to appear in court and present any proof at that time and obtain another judgment of execution herein. The judgment or decree rendered is conclusive and final. If the writ of execution issue, it remains for the respondent or defendant to defend the writ of execution by asserting and proving that the ten days have not elapsed or that an appeal has been taken, and therefore have the writ of *fieri facias* dismissed.

This is, as clearly can be seen, something required of the respondent or defendant. There is nothing more required of a judicial nature of the libellant.

Again we respectfully say that the honorable dissenting Judge has fallen into error by overlooking a most important fact. He says (Tr. 489):

> "But in fact there was an appeal within ten days, so that by its own terms this judgment never became *operative*."

We respectfully urge that the learned Judge is erroneously following the expression used in *Ex parte Sawyer, 88 U. S. 618*, as follows:

> "But the sureties occupy a different position. No decree was entered against them before the appeal. The order was that a judgment be entered if an appeal was not taken. The appeal was taken, and therefore this order never became operative."

The learned dissenting Judge has, we respectfully submit, overlooked something of compelling importance, and it is this:

From this viewpoint, the judgment is not *final* for *execution against the stipulators*, but he has overlooked the record.

1st. There is the Release Bond with the stipulation and condition above quoted (Tr. pp. 20-21).

2nd. He has overlooked the record as to the appeal. At transcript, p. 108, we note:

> "Minutes of September 10, 1932."
>
> "The petition of Hans Elliot, claimant and cross-libellant, for appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and his assignment of errors having been filed this 10th day

of September, 1932, and said appeal having been allowed in chambers this day,

It is now ordered in open Court that the supersedeas bond be and is hereby fixed in the sum of $10,000, and that the cost bond on appeal be and is hereby fixed in the sum of $250.00."

The $250.00 cost bond was given (Tr. p. 111), but *no supersedeas bond* in penalty of $10,000 was given.

This is established by looking at the transcript.

Now, we urge that when the Court says execution shall issue in ten days if no appeal be taken, it must have referred to what we civil lawyers refer to as a "suspensive" appeal bond, or a supersedeas bond. Manifestly, it did not refer to the $250.00 cost bond, as only a supersedeas bond could *stop execution* against claimant and his surety, the United States Fidelity & Guaranty Company.

If supersedeas had not been asked and supersedeas bond fixed, but no supersedeas bond filed, manifestly execution could issue, as a matter of right, after the lapse of ten days, even if an appeal were taken, upon only a Cost Bond.

And that is just what has occurred. The respondent claimant did not comply with the decree and take an appeal, suspending execution, so the decree against respondent claimant and his stipulator surety, the United States Fidelity & Guaranty Company, is absolutely final and execution may issue as decreed, after September 10, 1932.

We believe we are absolutely correct and logical when we say that the Court when speaking of an "appeal in ten days" must have had in mind an appeal which would stop execution, a supersedeas, because in effect the Judge said execution shall issue unless an appeal (supersedeas) be taken in 10 days after notice.

Service of the Decree had been made 31st of August, appeal taken on last day, Sept. 10, 1932, but respondent filed only $250 Cost Bond but no $10,000 supersedeas bond fixed by order of Court.

The very decree rendered conclusively establishes it is against Hans Elliot and his surety, the United States Fidelity and Guaranty Company.

The power of the Court, if no appeal with supersedeas was taken within ten days, over the surety—the United States Fidelity and Guaranty Company—was at an end and execution could issue.

In other words, expressed simply and directly, unless the stipulator surety, the United States Fidelity and Guaranty Company, took an appeal or joined in such an appeal with supersedeas in ten days, the judgment against it was final and *executory.*

No supersedeas appeal was taken by Hans Elliot within ten days, and no appeal of any kind was taken by the stipulator surety, the United States Fidelity and Guaranty Company.

The judgment is final and executory against Hans Elliot and his stipulator surety on the Release Bond of the

United States Fidelity and Guaranty Company, and we respectfully submit that the Honorable Dissenting Judge of the Court of Appeals was in error when it declared the judgment rendered was not operative and another or summary judgment against the surety on the Release Bond was necessary before execution could issue.

Wherefore we respectfully submit that the decree of the United States Circuit Court of Appeals is correct and should be affirmed.

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CARLOS ICAZA,
A. and L. S. CARRINGTON,
Counsel for Thomas R. Lombard,
Libellant and Respondent in Writ.